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IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The briefs filed by respondent and his supporting *amici curiae* spend much of their time addressing issues that are not in dispute. On the specific issues that we raise, however, they have less of value to say. As we discuss below, Title III does not apply to claims by persons providing services to—in particular, claims by persons working for—the operator of a place of public accommodation. *See* pages 1-12 *infra*. Furthermore, if it did, it would not require the Tour to alter its highest-level golf tournaments either by allowing one competitor to play without full compliance with its substantive rules or by eliminating the rule with which he is unable to comply. *See* pages 12-20 *infra*.

I. TITLE III OF THE ACT DOES NOT REGULATE THE WORKING RELATIONSHIP BETWEEN THE OPERATOR OF A PUBLIC ACCOMMODATION AND THE PERSONS THAT IT HIRES

It may be useful, at the outset, to clear some underbrush. We do not question that Tour events generally are played at places

of public accommodation. *See, e.g.*, Resp. Br. 16-25; US Br. 5-14. We agree that Title III bars discrimination against persons seeking to obtain goods and services offered at places of public accommodation, including persons seeking to obtain exercise or recreation at places that offer exercise or recreation to the public. *See, e.g.*, US Br. 20-24; NAPAS Br. 12-15. We agree that the opportunity to participate in athletic competitions can be among the goods and services offered to persons at places of public accommodation—for example, it may be offered to customers at places of exercise or recreation or to students at schools and universities—and that Title III thus may apply to participants in those particular competitions. *See, e.g.*, US Br. 12-14. And we recognize that the operator of a place of public accommodation can sometimes offer different types of goods and services to different categories of customers. *See, e.g.*, NAPAS Br. 11-12.

Our position is simply this: that Title III does not provide a basis for claims by persons that seek to furnish goods and services to, rather than obtain goods and services from, the operator of a place of public accommodation. In particular, we submit that the opportunity to work for the operator of a place of public accommodation is not a good or service that is offered to the public by a place of public accommodation. A person thus cannot bring a claim under Title III challenging the terms and conditions established by the operator of a place of public accommodation for the workers that it hires. That is so when the person seeks a position with the operator as an employee, and it is equally so when, as here, he seeks a position with the operator as an independent contractor. Regardless of his status, the worker in both cases is seeking to provide services to the operator, not receive them from the operator. His claim of discrimination thus arises under Title I of the Act, or not at all.

That principle controls this case. By the terms of his own complaint, respondent is seeking to challenge the terms and conditions (*i.e.*, adherence to the competitive rules) that the

Tour has established for golfers seeking to perform as part of its events. Although the professional golfers on the Tour are independent contractors, not employees—they are free to play in tournaments not affiliated with the Tour, and to earn endorsement and other income—they are nonetheless an integral part of the package of Tour events offered to spectators and television viewers, and the Tour compensates the golfers for their work based on performance. Respondent is thus no different from an insurance agent, lawyer, teacher, or many other kinds of workers that provide services to an operator of a place of public accommodation. Like them he has no cognizable Title III claim.

A. Title III declares that "no individual" shall be discriminated against on the basis of disability if that discrimination denies "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Although it is possible to read that language as allowing *anyone* at a place of public accommodation to bring a Title III claim—a view adopted by respondent, *see* Resp. Br. 25 ("Congress extended the protections of Title III to all 'individuals' at 'places' of 'public accommodation,' without limiting their purpose for being there or the uses being made of the facility")—this reading is at odds with the reading given by several *amici* supporting respondent, all of whom acknowledge that employees at a place of public accommodation cannot bring claims under Title III. *See* page 5 *infra*. More importantly, it conflicts both with the most natural meaning of the statutory language, which indicates that Title III is concerned with discrimination against potential *recipients of* (*i.e.*, persons seeking to "enjoy[]") whatever goods and services are offered to the public, and with a related provision of Title III, which, in affording protection to an "individual or class of individuals," defines those words in terms of the "clients or customers" of a place of public accommodation. *See* 42 U.S.C.

§ 12182(b)(1)(A)(iv).[1] (As several *amici* point out, the phrase "clients and customers" effectively serves as a shorthand reference describing the persons who "partake of" (US Br. 28) or "seek[]" (NAPAS Br. 13) the goods and services provided by places of public accommodation.) All this, then, leads to the critical question: whether a person seeking the opportunity to work for, or otherwise provide services to, the operator of a place of public accommodation is seeking to obtain a good or service that the place of public accommodation offers the public. In our view, he plainly is not.

First of all, as a matter of common language, it is hard to think that the prospect of working for a business is among the "goods, services, facilities, privileges, advantages, or accommodations" that members of the public are seeking to "enjoy[]." The usual understanding of the activities of a place of public accommodation is that the entity operating the public accommodation is supplying goods or services (which, of course, vary according to the nature of the public

[1] Even though that definition does not apply directly to the general provision prohibiting discrimination, *see* Pet. Br. 19-21, respondent and his *amici* offer no explanation for why Congress in Title III would protect persons *in addition to* "clients or customers" in one provision but *only* "clients or customers" in the other. Absent a good explanation, and we think that there is none, it is reasonable to think that the term "clients and customers" provides a useful working description of the persons protected by Title III. *See* NAPAS Br. 13 (words "embrace any individual who is covered" by Title III).

Respondent objects to our discussion of the "clients or customers" language, Resp. Br. 25-26, saying that it was not addressed below. But the Tour has argued throughout that Title III does not apply to the competitions conducted by the Tour, and the discussion of the term "clients and customers" is, like the other arguments advanced here, an argument in support of that position. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000) (internal quotes omitted).

accommodation) to persons seeking to obtain those goods and services. The workers hired by the public accommodation to provide goods and services to the recipients are not themselves normally regarded as recipients of goods and services; they are, by virtue of their working relationship with the operator, part of the goods and services that the public accommodation is offering. Indeed, the definitions in the Act specifically define a "public accommodation" in terms of the kinds of goods and services that it makes available to the public, not by the kinds of opportunities that it extends to potential workers. *See* 42 U.S.C. § 12181(7)(A)-(L).[2]

It would also distort the Act as a whole to treat the opportunity to work for the operator of a place of public accommodation as a good or service that the public accommodation offers. Because the words "good" or "service" provide no basis for distinguishing among different types of working relationships, they would, if they covered such work relationships at all, presumably include the opportunity to work for the operator in *any* capacity, including as an employee or as an independent contractor. Although respondent apparently endorses this sweeping proposition, Resp. Br. 25, several of the supporting *amici* explicitly disavow it. *See* US Br. 18-19 n.17; NAPAS Br. 15; Dole Br. 14. Either directly or indirectly, they accept the contrary view set forth in the relevant House Report, which expressly declares that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House

[2] Although respondent (Resp. Br. 22-23) seeks to rely on *Daniel v. Paul*, 395 U.S. 298 (1969), a case brought under Title II of the Civil Rights Act of 1964, that case has nothing to do with any disputed issue here. We have acknowledged that Title III of the Disabilities Act, like Title II of the Civil Rights Act, bars discrimination against persons seeking to use public accommodations for purposes of recreation or entertainment. *See* Pet. Br. at 24 n.18.

Report). That view is correct. Nothing in the text of Title III, or in the legislative record, indicates that Title III is meant to supplement the protections of Title I by addressing discrimination against employees who happen to work for the operator of a place of public accommodation, and that reading would lead to potential work-related lawsuits against the kinds of small businesses (*e.g.*, bakeries, barber shops, dry cleaners) that Congress quite deliberately did not make subject to the provisions of Title I. *See* Pet. Br. 24-30.

We thus think it apparent that, if the Tour "employed" respondent to do precisely what he does now, his objection to the conditions set for Tour golfers would fall outside the boundaries of Title III. Several *amici*, therefore, try to draw a distinction between employees and independent contractors, contending that, even though Title III does not give rise to workplace claims by employees, it does give rise to workplace claims by independent contractors. *See* US Br. 16-20; NAPAS Br. 15-17. But this theory does not square with any reasonable interpretation of the statutory text. Once it is understood that employees do not fit within the category of "individual[s]" seeking to obtain "goods and services" at a place of public accommodation, it follows, as a matter of ordinary statutory interpretation, that other persons seeking to work for the operator necessarily fall outside that category as well. An independent contractor no more seeks to obtain "goods and services" (if they do not include "work") from the operator of a public accommodation than an employee does. The terms of the Act thus cover both or neither.

The notion that Title III covers claims by independent contractors, but not employees, would also lead to a most peculiar statutory scheme. According to that scheme, the workers specifically favored by Congress in the Act (employees) would be disfavored under Title III, while, at the same time, Title III would suddenly furnish a basis for claims by other workers (independent contractors) that Congress, when directly dealing with the subject of work-related claims, chose

not to cover at all. Although the United States tries to justify this irrational distinction, saying that employees working for employers with fewer than 15 employees "are (unlike independent contractors) *expressly* excluded from coverage under Title I . . . ," US Br. 18-19 n.17 (citing 42 U.S.C. § 12111(5)(A)), this argument simply misstates what Title I says. The text of Title I does not "expressly" deny protection to employees at smaller employers: rather, it implicitly excludes them because they are not in the category of workers that, through the interplay of definitions in Title I, are *expressly included* in the provisions granting protection. Exactly the same thing is true for independent contractors. They are not within Title I because they are not within the included category of "employees" of a covered "employer."

The practical effects of applying Title III to claims by independent contractors would be even more extraordinary and unanticipated than applying it to claims by employees. As the briefs supporting respondent well demonstrate, the extension of Title III to claims by independent contractors would raise the prospect of lawsuits by workers ranging from performers in a theatrical production to messengers and office equipment repairmen at a law office. *See, e.g.*, Resp. Br. 24-25; K-T Support Group Br. 9. Nothing in Title III suggests any such open-ended application. While some persons performing work-related activities at a place of public accommodation (for example, a writer doing research at a library) are properly deemed to be receiving goods and services—just like other members of the public making use of the same facilities—that class cannot reasonably be expanded to include persons who are there specifically to provide services to the operator of the public accommodation (for example, the librarian). The latter simply fall on the wrong side of the recipient/provider line.

The position taken by respondent and his *amici* would also obliterate the distinction between parts of a public accommodation open to clients or customers (accessible under Title III) and those parts reserved for persons hired by, or providing

services to, the operator of the public accommodation (not accessible under Title III). *See* USGA Br. 8-19. Although the United States seems to imply that every area in a place of public accommodation must be treated as open to the public in all respects, US Br. 16 n.15, this idea not only is implausible on its face, but is inconsistent with the relevant Department of Justice regulations, which acknowledge that areas of a mixed-use facility "not open to the general public" are "not subject to the requirements for public accommodations." 28 C.F.R. ch. 1, pt. 36, App. B, at 624. For that reason, it is generally accepted that members of the general public have no right to enter into private areas at places of public accommodation, or to make use of facilities offered to workers alone. *See, e.g., Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 n.5 (11th Cir. 2000); *Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 212 F.3d 1159 (9th Cir. 2000). The fact that places reserved for persons providing services are off limits, however, underscores the understanding that Title III is concerned with potential discrimination against clients and customers of a place of public accommodation, not the workers that it hires. The public simply does not receive goods and services in these closed-off areas.

The regulations promulgated under Title III reinforce this view. Although the United States relies (US Br. 9-12) upon these regulations to argue a point that we do not contest—that Title III can sometimes apply to "competitive athletics"[3]—the

[3] As we have indicated, *see* page 2 *supra*, Title III will apply because the participants in most athletic competitions are naturally regarded as receiving the goods and services of a place of exercise or recreation or of an educational institution (which usually offer competitive athletics to their students). In addition, of course, Title I applies to employees working for covered employers that engage in competitive athletics. Thus, when "Congress specifically considered the implications of the Disabilities Act for drug-testing programs conducted by 'professional sports leagues,'" US Br. 8 (citation omitted); *see also id.* (quoting portions of legislative history), it did so in the process of considering the provisions of Title I, not Title III.

most telling thing about its discussion of the regulations is that it cannot cite to a single example that has anything to do with the working relationship between the operator of a place of public accommodation and the people (whether employees or independent contractors) that it hires.[4] This is not a matter of mere oversight; the sole focus of the pertinent Justice Department regulations is upon the treatment accorded to patrons of places of public accommodation. *See* Pet. Br. 27. That focus echoes the discussion of Title III in the legislative history, which likewise (and unlike the discussion of Title I) deals with discrimination against persons obtaining goods and services at a place of public accommodation, not persons providing them. *Compare* House Report, pt. 2, at 99-129, pt. 3, at 53-69 (discussing Title III) *with* House Report, pt. 2, at 54-83, pt. 3, at 31-49 (discussing Title I). Thus, the text of Title III, its legislative history, and the regulations promulgated thereunder all point to the same conclusion: Title III does not govern the working relationship between the operator of a place of public accommodation and the workers that it hires.

B. Confronted by this statutory and regulatory landscape, respondent and various *amici curiae* argue that the relationship between respondent and the Tour is not really a working relationship after all, but just the opposite: a relationship in which respondent (as a "client or customer") is seeking to

[4] The examples cited by the United States all deal with the distinct provisions requiring public accommodations and "commercial facilities" (which are not even subject to other provisions of Title III) to construct new facilities and to alter existing facilities in accordance with particular guidelines. *See* 42 U.S.C. § 12183. While the House Report indicates that new construction and alterations to existing facilities generally should make both work and public areas accessible to disabled persons, *see* House Report, pt. 2, at 116-21, pt. 3, at 62-66, the Report makes clear that this provision is not meant to convert Title III into a alternative version of Title I, imposing supplemental job standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.* *See also* Equal Employment Advisory Council Br. 10-12.

obtain services from the Tour. *See* Resp. Br. 30-31; US Br. 19-20, 23-24; NAPAS Br. 15-17. This portrayal is contradicted by the record and, in any event, wholly unconvincing.

Most notably, the picture of respondent-as-consumer is belied by his own claims. In his complaint, respondent specifically asserted a claim of "Employment Discrimination," alleging that the Tour had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions and privileges of employment." J.A. 96. Although this claim was brought under Title I of the Act, it is, for all intents and purposes, identical to his Title III claim. While the "Employment Discrimination" claim is set out in the statutory language of Title I, and the "Public Accommodation" claim is set out in the statutory language of Title III, there is no substantive difference between them. Each rests upon exactly the same grievance: that "[respondent] cannot effectively compete in the NIKE TOUR or the PGA TOUR or obtain compensation, benefits, privileges or advantages from the NIKE TOUR or the PGA TOUR unless he is permitted to use a golf cart in NIKE or PGA TOUR events." J.A. 93. That is a claim seeking the opportunity to work in Tour events, pure and simple.

The work-related nature of the claim is also apparent from the evidentiary record. The district court observed that "the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors." J.A. 79. To offer these "competitive athletic events," the Tour calls upon approximately 200 professional golfers, each of whom commits to play in a minimum of 15 tournaments each year. Although the Tour is not the sole source of income for its players—apart from their commitment to the Tour, they are free to play in professional events not conducted by the Tour, to appear in exhibitions, and to earn often highly-lucrative endorsement

income—it does offer the golfers enough potential compensation to assure that they play for the Tour on a regular basis, thereby providing the continuity from event to event that golfing fans want and expect. Respondent himself has explicitly acknowledged that Tour "revenue is contingent on the PGA-employing touring golf professionals such as Mr. Martin." Brief for Casey Martin, C.A. 9, at 56.[5]

The effort to cast respondent as a consumer of goods and services also misses a basic point. Although respondent and his *amici* talk of various benefits flowing from the Tour to its member golfers, it turns out on closer examination that what respondent, and other Tour golfers, are said to receive are merely things that flow directly and exclusively *from their agreement to work for the Tour*. Thus, whereas respondent asserts that "[t]he PGA competitions allow Mr. Martin to focus exclusively on his game and leave the logistics of his performance to others, while at the same time providing a forum to demonstrate his skills and attract third party endorsement," Resp. Br. 30-31; *see also* NAPAS Br. 17, these supposed "goods and services" are not goods and services provided to the public, but ancillary benefits that are extended as part and parcel of the working relationship between the Tour and its players. Far from being offered to "clients or customers," they are granted in exchange for the commitment of those golfers who play on the Tour.[6]

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[5] Even though several *amici* point to the fact that respondent does not earn a *guaranteed* income from the Tour, *see* US Br. 19; NAPAS Br. 17, that fact does not show that the relationship between respondent and the Tour is not a working one. Many persons working at public accommodations earn money that is contingent on performance, including insurance agents (commissions) and tennis or golf instructors (lesson fees).

[6] The United States also argues that respondent is not really an independent contractor because the Tour has "no right to select or reject golfers," choosing to rely instead on the results of a qualifying competition. US Br. 19. But the fact is that the Tour does "select and reject" golfers; it simply does so based on an objective, rather than subjective, criterion:

In this respect, respondent is in the same situation as many persons working at places of public accommodation. An independent contractor lecturing at a private university, for example, is given, among other things, the opportunity to associate with distinguished academics, to meet with students at prearranged times and places, to demonstrate his skills to interested observers, and to gain visibility within his profession, but it would be fanciful to say that, as a consequence, he is properly regarded as a member of the public partaking of goods and services offered by the university. On the contrary, a university lecturer is helping to provide educational services to university students (who *are* clients and customers of the university) and, while he may receive incidental benefits in addition to payment for his labor, those benefits are truly incidental—that is, they are a direct consequence of, and inseparable from, his agreement to work for the university. He remains in the capacity of a person working for the operator of a place of public accommodation, and his complaints about the terms and conditions established for working there are not cognizable under Title III.

The Act thus does not support the claims made by respondent. As an independent contractor, respondent cannot obtain redress under Title I, and, as a person working for the operator of a place of public accommodation, he cannot bring his claim under Title III. Those grounds are sufficient to deny him relief.

II. REQUIRING SELECTIVE WAIVER OR ELIMINATION OF OUTCOME-AFFECTING RULES WOULD FUNDAMENTALLY ALTER TOUR EVENTS

Even if Title III does provide a basis for the claim asserted by respondent, it does not require the Tour to waive or eliminate its legitimate competitive rules. Although the courts below thought

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performance in a designated tournament. Having paid an entry fee to defray expenses, the players compete for the right to perform as part of the Tour.

otherwise, neither the court of appeals nor the district court ever undertook the necessary inquiry into the basic nature of the highest-level Tour competitions, which depend upon the expectation that all competitors will play according to a uniform set of substantive (*i.e.*, potentially outcome-affecting) rules. Totally disregarding the need for uniformity, the Ninth Circuit instead ordered the Tour to offer a *different* competition, allowing one competitor to play without observing a substantive rule that has been part of the relevant Tour competitions from their inception. This lack of respect for uniform rules—the understood basis of competition in every professional sport—truly works a fundamental alteration of Tour events. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1006 (7th Cir. 2000); 42 U.S.C. § 12182(b)(2)(A)(ii).

The briefs filed by respondent and his *amici* show a similar inattention to the importance of uniform rules. Although they talk at length about the "walking rule" itself, they say almost nothing about the fact that adherence to uniform competitive rules is at the core of elite sports competitions in general, and of the relevant Tour events in particular. Indeed, to suggest that professional athletes may deviate from the rules applicable to other competitors, they largely rely on two isolated examples, neither of which is in the record and both of which appear to be inaccurate. *See* Resp. Br. 49-50.[7] Otherwise, they just point to recreational sports or less exacting types of sports competitions. As the briefs filed by *amici* USGA, ATP, and LPGA make

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[7] Nothing in this record demonstrates that either professional baseball or professional football allowed one competitor to disregard a rule applicable to other players. So far as we can tell, the rules of professional baseball appear to allow all pitchers to do what Jim Abbott was doing (*i.e.*, spin the ball during his delivery) so long as it does not deceive a baserunner, and respondent cites no rule of professional football with respect to the shoe worn by Tom Dempsey. Moreover, there is no evidence that the rules of professional baseball or football were waived or altered in those instances; at most, it appears, officials determined that the actions of those particular players did not violate any relevant rules.

clear, however, the essence of competitive athletics at the highest level is that all players, without exception, must perform according to a uniform set of rules. *See* USGA Br. 19-28; ATP/LPGA Br. 4-12.

To the extent that respondent and his *amici* address the Tour competitions at issue here, their arguments for dispensing with uniformity are equally baseless. For example, although respondent relies on various other events conducted by the Tour without a walking requirement, Resp. Br. 36-37, the existence of those tournaments demonstrates not that rules can vary from player to player—all players are subject to identical rules—but that some golf competitions can be played under less difficult standards. Those tournaments are simply a different kind of competition. With respect to the tournaments that respondent seeks to enter (the competitions actually in question), neither respondent nor any *amicus* can identify a single tournament put on by the Tour that has allowed selected players to play without observing the full set of substantive rules applicable to other golfers. At most, respondent notes that Tour officials have occasionally permitted players (*all* players) to be shuttled for short distances, Resp. Br. 36, when, for example, there is an unusual course configuration (*e.g.*, where parts of the course are widely separated) or there is a threat to players' safety (*e.g.* the need to cross streets). The district court expressly found, however, that "[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)." J.A. 64. In short, the history of the highest-level Tour events shows consistent adherence to the importance of uniform rules.

This background demonstrates that it would fundamentally alter Tour competitions for one player to be excused from compliance with a particular substantive rule. Although the Act does not define the term "fundamentally alter," the specific regulations addressing the term—cited in our brief, Pet. Br. 32, but ignored by respondent and his *amici* (including the United States)—make clear that Title III does not compel an organization to make changes that would force it to depart from

its "normal course of business." *See* 28 C.F.R. ch.1, pt. 36, App. B, at 641. Thus, for example, a bookstore need not carry books that it does not otherwise carry, and a physician need not modify the medical services offered to his or her patients. *Id.* Those examples fit the present case: it is hard to imagine anything further from the "normal course of business" of Tour events than a requirement that the Tour vary its substantive rules according to the physical limitations of various competitors. To do so, in fact, would make it impossible for the Tour to do what it has traditionally done: to measure and compare competitive golfing performances by testing all players under the same standards.

Perhaps recognizing that the case for dispensing with uniformity is dubious, some *amici* offer their own solution: to have the Tour eliminate the "walking rule" for all competitors. *See* NAPAS Br. 21. But this is just fundamental alteration of a different stripe. It would no more be within "the normal course of business" for the Tour to conduct its highest-level events without a walking requirement than it would be to conduct them with different rules for different players. The highest-level Tour competitions have always had a walking requirement, for the very reason that it makes those particular competitions more demanding. J.A. 258-59. A golf tournament without walking is, once again, a different kind of competition.

The NAPAS suggestion, while failing to solve the "fundamental alteration" problem, does illuminate an important part of the dispute here. At bottom, its argument (like the argument of other *amici*, *see*, *e.g.*, Dole Br. 26-29) rests upon a basic proposition: that professional sports organizations can be required to modify any substantive rule that puts disabled athletes at a disadvantage *unless* the governing organization is able to establish that the rule is, by some standard or other, "fundamental" to the game. But this theory, which was largely adopted by the Ninth Circuit (J.A. 44-45), assumes that it is possible to change the substantive rules of a competition, either

by selective waiver or elimination, without fundamentally altering the nature of the particular competition itself. In our view, that assumption is simply incorrect. A professional sport is, by definition, a contest conducted under specified substantive rules—that is, rules that are designed to, and do, potentially affect the outcome of the contest—and a rule properly found to be substantive thus cannot be set aside without turning the defined competition into a different competition. In its decision below, the Ninth Circuit simply changed what Tour rules require competitors to do.

The attempt to carve out a category of waivable "non-fundamental" rules is disturbing in other respects as well. In particular, it is inconsistent with the understanding, acknowledged by this Court in the antitrust context, that sports organizations have (and, indeed, must have) broad latitude "to create and define the competition." *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984). This latitude is accorded not because competitive sports occupy some preferred place in society, but because substantive rules established by sports organizations are, by their very nature, less susceptible to reasoned second-guessing than the policies and practices of other organizations. That is especially so in the present context because the substantive rules of a sport are meant to set up tests of physical ability, a purpose that does not readily lend itself to waivers based on physical disabilities. *See* Pet. Br. 33-34, 36. Moreover, as the NAPAS brief correctly points out, the substantive rules defining a particular athletic competition, unlike most other kinds of business requirements, "are not means to an end; they are an end in themselves." NAPAS Br. 24. Thus, for example, an Olympic weightlifting competition is designed and conducted in order to determine which competitor can lift the most weight, not to assess (as in the usual employment context) whether a particular person can lift enough weight to carry out the functions of a designated job. As a result, there is no objective standard for determining whether a specific requirement applicable to the competition—*e.g.*, that the

weightlifters perform their lifts from a prescribed position—is indispensable to the nature of the test.

We question, therefore, whether judges will be able to pick and choose among the multiple rules defining an athletic competition, approving some and disapproving others, based on nothing more than an individual assessment of the rules' importance to that competition. Even if (as the United States suggests) sports organizations ultimately will win most lawsuits challenging their right to apply competitive rules uniformly, *see* US Br. 28, the grounds for rational and consistent decision-making are nonetheless absent. Given that the competitive rules of any sport can be changed in theory—in tennis, for example, the net could be higher or lower, the court narrower or longer, the ball allowed to bounce twice—the "fundamental rule" approach would mean that the governing officials of a professional sport can never really define the nature of a particular competition but must ultimately depend on what judges think that the competition should be. The treatment of the rule at issue here is a prime example. The Seventh Circuit in *Olinger* held that walking was an integral part of the highest-level golf tournaments, and the Ninth Circuit held that it was not.

To state the obvious: the "walking rule" is no less fundamental to competitions in the Ninth Circuit than to competitions in the Seventh Circuit. The fact that different courts of appeals arrived at different conclusions with respect to the same rule strongly suggests that courts cannot reliably separate fundamental substantive rules (rules that may be enforced) from non-fundamental substantive rules (rules that must be waived or eliminated). As we have pointed out, Pet. Br. 36-37, the Ninth Circuit offered no standard for making that determination, and respondent and his *amici* likewise offer none. At best, they suggest or apply a variety of multi-part tests, weighing the rule at issue and the circumstances of each disabled athlete, all of which would leave the status of any given rule—whether in golf or other sports—wholly up in the air. *See, e.g.*, Resp. Br. 31-34; US Br. 24-30.

Even if these various tests could distinguish between fundamental and non-fundamental rules, however, they would provide no basis for a forced waiver of the "walking rule" in Tour competitions. Although respondent and his *amici* argue to the contrary, placing great reliance on the factual findings in this case, *see, e.g.*, Resp. Br.35-45; NAPAS Br. 26-30; US Br. 28-30, there is an air of unreality about all this emphasis, given the likelihood that the briefs would dispense with a similar endorsement of the *Olinger* findings. Furthermore, as we pointed out in our opening brief, Pet. Br. 36, the critical finding cited by the Ninth Circuit to show that walking is not important in the highest-level Tour events—that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances" (J.A. 43) (internal quotation marks omitted)—necessarily, and notably, acknowledges that the "fatigue factor" *is significant* under certain circumstances (and may play some lesser role at other times). Rather than deal with the point directly, respondent has now relegated this finding to a footnote in his argument, Resp. Br. 41 n.22, while continuing to make assertions as though the finding said that fatigue never had any effect at all. *See* Resp. Br. 39 (discussing "[t]he most compelling evidence that walking during competitive golf does not induce fatigue"). (A group of *amici* does acknowledge the nature of the finding, though wishfully characterizing it as "ambiguous." NAPAS Br. 28.) The finding stands on its own merits, however, and it stands, at the very least, for the proposition that the walking requirement can significantly affect performance in Tour events.

This finding thus takes care of the multiple arguments based upon the premise that golf is really all about shotmaking. *See* Resp. Br. 35. We do not dispute, of course, that shotmaking is the *sine qua non* of golf at all competitive levels—from beginning golfers to those qualified to play on the PGA Tour—but the important point is that shotmaking is a skill tested in different ways at different levels. Unlike recreational golf, or less rigorous professional events, the highest-level Tour events

require that shots be executed under the most demanding conditions, including the fatigue induced by walking the golf course over four days. That makes the test different from the test set for golfers in other competitions. Because golf is a game of precision, even small changes resulting from fatigue can affect the ability of professional golfers to make difficult shots. J.A. 174-78; 189-91. And, because the difference in relative scores among golfers is slight, even minor changes in shotmaking ability can mean the difference between success and failure on the Tour. *See* Pet. Br. 36 n.25, 37-38. To alter any rule affecting shotmaking thus leads to a fundamental alteration of the competition.

Finally, to demonstrate that Tour competitions are not really changed by the waiver granted below, respondent and his *amici* rely on a finding that respondent, by virtue of his disability, endures as much fatigue in walking part of the course as "able-bodied" golfers do in walking all of the course. *See, e.g.*, Resp. Br. 44-45; US Br. 29. But this finding, even if thought correct, is beside the point.[8] The PGA Tour is not seeking to inject some fixed level of fatigue into its competitions, regardless of the source; it is seeking to inject whatever fatigue each individual player may happen to experience from having to perform the same assigned task (*i.e.*, walking the entire golf course during the entire tournament). It is presumably true that certain golfers are subject to heightened levels of fatigue because of disabilities (as defined in the Act) or because of other conditions such as painful back ailments, diabetes, or

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[8] As we discussed in our opening brief, there is no reliable way to make this determination. *See* Pet. Br. 39-41. Furthermore, the most likely evidence of possible competitive advantage would arise out of a comparison between respondent and other golfers with physical infirmities (if not disabilities), who feel the greatest effects from the inability to use a cart. *See* USGA Br. 23 n. 8 (discussing competition in which respondent with a cart defeated an injured golfer without one). The courts below, with their comparison to a hypothetical "able-bodied" golfer, did not make any such inquiry.

allergies, but it would change Tour events dramatically if players could lay claim to the use of a golf cart for some or all of a tournament on the ground that they will still endure the same amount of fatigue as able-bodied competitors will endure by the end of the tournament. That is simply changing the nature of the test.

There is thus no basis in Title III for the Ninth Circuit to insist that the Tour must redefine the nature of its highest-level competitions, either by granting selective waivers of the "walking rule" or by eliminating it completely. The Act does not require the Tour to accommodate disabled athletes by allowing them to play a different game.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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